

FILED

OCT 17 2019

Clerk, U S District Court
District Of Montana
Billings

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS KENT STEVENS,

Defendant.

Case No. CR-19-55-BLG-SPW

**ORDER GRANTING
MOTION TO COMPEL
PHOTOGRAPHY OF ARMS
AND HANDS**

Pending before the Court is the Government's motion to compel the defendant to submit to photographs of his arms and hands. (Doc. 25.) The Defendant states he has no objection to the Government's motion, but he asserts the best evidence of the alleged scarring on his arms would be a physical display to the jury during trial. He asks the Court to allow him to do so. (Doc. 27.)

The Fifth Amendment does not protect a defendant from giving non-testimonial evidence. *United States v. Dionisio*, 410 U.S. 1, 5–6 (1973) ("It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination.") Photographing a defendant's physical characteristics—like

tattoos or scars—for display to the jury or requiring the defendant to reveal those characteristics to a jury does not run afoul of the Fifth Amendment. *United States v. Nixon*, 2015 WL 4430176, *2 (E.D. Mich. July 20, 2015); *see United States v. Bay*, 762 F.2d 1314, 1315 (9th Cir. 1984) (holding a display of hands, along with other apparent physical characteristics relevant to most eyewitness identifications, was non-testimonial).


The Government alleges the Defendant's scars on his hands and arms are readily apparent, and it intends to use those scars for identification purposes. The Court finds the scars are non-testimonial evidence, and their display will not run afoul of the Fifth Amendment.

How the Government resolves to present that evidence—whether through photographs or having the Defendant show his arms to the jury at trial—is within its discretion. The Court sees no reason for limiting the evidence to a physical display during trial. The Defendant is free to show his arms to the jury during trial or to have photographs of his own taken if he takes issue with the Government's photographs. Accordingly,

IT IS HEREBY ORDERED that the Government's motion (Doc. 25) is **GRANTED**. The Defendant shall submit to photographs of his arms and hands at a place and time agreed to by the parties.

The Clerk shall notify the parties of this Order.

DATED this 17th day of October, 2019.


SUSAN P. WATTERS
United States District Judge